Missouri Law Review

Volume 45
Issue 4 *Fall 1980*

Article 8

Fall 1980

Attorney Malpractice-Wrongful Settlement by the Insured's and Insurer's Joint Defense Attorney

Jason A. Reschly

RECENT CASES

ATTORNEY MALPRACTICE–WRONGFUL SETTLEMENT BY THE INSURED'S AND INSURER'S JOINT DEFENSE ATTORNEY

Rogers v. Robson, Masters, Ryan, Brumund & Belom[1]

On February 4, 1972, a complaint was filed by plaintiff-Quilico against his physician, Dr. James D. Rogers, alleging negligence in the care and treatment given to Quilico by defendant-Rogers. Dr. Rogers' insurance carrier, Employer's Fire Insurance Company, retained the law firm of Robson, Masters, Ryan, Brumund & Belom (Robson), to represent Dr. Rogers in the *Quilico* medical malpractice action. While suit was pending, Dr. Rogers informed the law firm that he would not consent to any offer of settlement. Nevertheless, pursuant to a clause in the insurance contract which granted the insurance company the authority to settle without the consent of the insured,[2] Robson settled the *Quilico* medical malpractice action out of court for $1,250. Not only was the consent of Dr. Rogers never obtained,[3] he was not informed of the settlement offer prior to settlement.

Dr. Rogers filed suit in 1977 alleging that Robson had wrongfully settled the *Quilico* action. The circuit court granted summary judgment to Robson, but the Illinois Court of Appeals reversed and found Robson liable to Dr. Rogers on the basis of ethical obligations, independent of any contractual obligation. The decision of the court of appeals was summarily affirmed by the Illinois Supreme Court.[4]

---

1. 74 Ill. App. 3d 467, 392 N.E.2d 1365 (1979), *aff'd*, No. 52548 (Ill. June 20, 1980).

2. The insurance policy required consent of the insured for settlement, unless the policy had been terminated at the time of settlement. Dr. Rogers' policy had been terminated prior to settlement of the *Quilico* action and therefore the insurer had the power to settle without written consent of the insured. The court did not find the settlement clause to be contrary to public policy. *Id.* at 471, 392 N.E.2d at 1370.

3. The dissent believed that Dr. Rogers implicitly had consented to settlement in a letter to the defendant which read: "I refuse to participate any further with Mr. Quilico's absurd accusations . . . . I trust you can dispose of this problem quickly and with little difficulty." *Id.* at 478, 392 N.E.2d at 1374 (Alloy, J., dissenting).

4. Rogers v. Robson, Masters, Ryan, Brumund & Belom, No. 52548 (Ill. June 20, 1980). The decision of the Illinois Supreme Court was short and failed to address any issue in detail. In essence, the court incorporated by reference the decision of the court of appeals. The basis of the affirmance was that "[t]he

The relationship between attorney, insurer, and insured has been characterized as a tripartite relationship.[5] The insurance defense attorney has two clients, the insurer and the insured, with corresponding obligations to each. Although the attorney is employed by the insurance company, he is hired to defend an action against the insured. While the attorney may, in many situations, adequately represent both interests concurrently, conflicting interests between the insured and insurer often arise.[6] When this occurs, the attorney will be unable to exercise independent judgment for either client and therefore will be unable to comply with the standard of professional conduct set forth in Canon 5 of the ABA Code of Professional Responsibility, unless he ceases to represent at least one of the parties or each consents to the dual representation.[7] While this failure to comply with the minimum standards of conduct established by the Code is an ethical problem and not one of tort law, these standards are a relevant consideration in an attorney malpractice action.[8]

When a conflict of interest between clients arises, the attorney is faced with serious ethical problems. The Code provides two options: withdraw from the representation of one or both parties,[9] or, "if it is obvious that he can adequately represent the interest of each and if each consents to the representation after *full disclosure* [by the attorney] of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each,"[10] the attorney may continue to represent

---

record does not show that there is no genuine issue of fact" and therefore was not a proper case for summary judgment. *Id.*, slip op. at 3. Since the Illinois Supreme Court failed to adequately ventilate the issues, this article is a discussion of the opinion written by the Illinois Court of Appeals.

5. 74 Ill. App. 3d at 472, 392 N.E.2d at 1370. *See also* American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 590, 113 Cal. Rptr. 561, 570 (1974); Maryland Cas. Co. v. Peppers, 64 Ill. 2d 187, 198-99, 355 N.E.2d 24, 31 (1976); Mallen, *Insurance Counsel: The Fine Line Between Professional Responsibility and Malpractice*, 45 INS. COUNSEL J. 244, 244 (1978).

6. *See* MO. SUP. CT. R. 4, EC 5-17; NATIONAL CONFERENCE OF LAWYERS & LIABILITY INSURERS, GUIDING PRINCIPLES (1969). Situations giving rise to a conflict of interest include coverage disputes, collusion by the insured, settlement of claims when the offer is within policy limits but the potential liability exceeds the policy limits, and subrogation rights. *See* Mallen, *supra* note 5. *See, e.g.*, Helm v. Inter-Insurance Exch., 354 Mo. 935, 192 S.W.2d 417 (En Banc 1946) (conflict of interest arose as to whether the insured was covered under the policy).

7. Mo. SUP. CT. R. 4, Canon 5 states: "A lawyer should exercise independent professional judgment on behalf of a client."

8. 74 Ill. App. 3d at 473, 392 N.E.2d at 1371. The Code has been used to set a standard of conduct for a negligence action. *See* Lysick v. Walcom, 258 Cal. App. 2d 136, 149, 65 Cal. Rptr. 406, 415 (1968); Ishmael v. Millington, 241 Cal. App. 2d 520, 526, 50 Cal. Rptr. 592, 595-96 (1966); Crest Inv. Trust, Inc. v. Comstock, 23 Md. App. 280, 301-02, 327 A.2d 891, 904 (1974). At least one leading authority advocates that violation of the Code in a malpractice action should have the same per se effect that violation of a criminal statute has in a negligence action. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. REV. 281, 286-87 (1979).

9. Mo. SUP. CT. R. 4, DR 5-105(B).

10. Mo. SUP. CT. R. 4, DR 5-105(C) (emphasis added).

both. Under either option, if the attorney continues to represent the insured, the attorney owes the insured the same professional obligations that would exist had the attorney been personally retained by the insured.[11] One of the obligations resulting from this attorney-client relationship requires the attorney to inform the client of any progress in the case or controversy. This obligation clearly includes a duty to inform the insured of any settlement offers that may affect him.[12]

The majority in the *Rogers* attorney malpractice action found that when Robson became aware that settlement was imminent, knowing that the insurance company desired to settle, even though Dr. Rogers had expressed an unwillingness to cooperate in such a result, a conflict of interest arose which made it improper for Robson to continue to represent both clients without full disclosure.[13] By continuing to represent the insured and the insurer without disclosure, Robson breached its ethical obligations to Dr. Rogers. The court concluded that under these circumstances, Robson could be liable to Dr. Rogers for any loss suffered because of its failure to disclose.[14] The rationale supporting such a conclusion is that the failure to inform Dr. Rogers of the proposed settlement foreclosed any alternatives otherwise available to him. He could have consented to continued representation by Robson at the expense of the insurance company, with the likelihood that the case would be settled without his consent pursuant to the insurance policy. On the other hand, he could have released the insurance company from its obligations under the policy and defended the suit using his own attorney, bearing the risk of an adverse judgment.[15] As a result of the failure of Robson to inform Dr. Rogers of these two alternatives, Dr. Rogers suffered alleged damages consisting of deprivation of an opportunity to pursue successfully a malicious prosecution action against Quilico for bringing the medical malpractice action;

11. 74 Ill. App. 3d at 472, 392 N.E.2d at 1371. *See* Ivy v. Pacific Auto. Ins. Co., 156 Cal. App. 2d 652, 659, 320 P.2d 140, 145 (1958) (court found attorney owes a high duty of care to both insured and insurer); Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 52, 149 N.E.2d 482, 486 (1958) (attorney bound to same high standards to insured, whether or not privately retained). In Parsons v. Continental Nat'l Am. Group, 113 Ariz. 223, 227, 550 P.2d 94, 98 (1976), and American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 592, 113 Cal. Rptr. 561, 572 (1974), the loyalty to the insured was deemed paramount.

12. *See* Lysick v. Walcom, 258 Cal. App. 2d 136, 151, 65 Cal. Rptr. 406, 416 (1968); Ivy v. Pacific Auto. Ins. Co., 156 Cal. App. 2d 652, 660, 320 P.2d 140, 148 (1958); Yeomans v. Allstate Ins. Co., 121 N.J. Super. 96, 102, 296 A.2d 96, 99-100 (Morris County Ct. 1972), *aff'd*, 130 N.J. Super. 48, 324 A.2d 906 (App. Div. 1974); Hamilton v. State Farm Mut. Auto. Ins. Co., 9 Wash. App. 180, 185, 511 P.2d 1020, 1024 (1973), *aff'd*, 83 Wash. 2d 787, 523 P.2d 193 (1974). *But see* Waters v. American Gas Co., 261 Ala. 252, 261, 73 So. 2d 524, 532 (1953) (court suggested that the duty of communication was only to the insurer).

13. 74 Ill. App. 3d at 474, 392 N.E.2d at 1372. *See* Mo. Sup. Ct. R. 4, DR 5-105; National Conference of Lawyers and Liability Insurers, Guiding Principles Principle V (1969).

14. 74 Ill. App. 3d at 475, 392 N.E.2d at 1372. *See also* Lysick v. Walcom, 258 Cal. App. 2d 136, 153, 65 Cal. Rptr. 406, 417 (1968).

15. 74 Ill. App. 3d at 475, 392 N.E.2d at 1372.

loss of direct and referred surgical patients, and increased professional liability insurance premiums resulting from the medical malpractice action; and additional legal fees in pursuing the attorney malpractice claim.[16] The court found these allegations to be sufficient to state a cause of action and remanded the attorney malpractice case so the jury could resolve the questions of proximate cause and damages.[17]

The issue of proximate cause was the point upon which Justice Alloy, of the court of appeals, dissented;[18] he believed there could be no causation as a matter of law. Though in total agreement as to Robson's obligations to Dr. Rogers resulting from the attorney-client relationship, Justice Alloy concluded that the breach of these obligations was not the "proximate cause" of Dr. Rogers' damages for two reasons. First, Dr. Rogers was not deprived of any rights or benefits under his insurance contract since the insurance company had the right to settle without his consent.[19] Second, the damages alleged were too speculative. Justice Alloy argued that Dr. Rogers would have had to prevail in the *Quilico* medical malpractice action and in a subsequent malicious prosecution action against Quilico before a loss could be established. Justice Alloy reasoned that

> [t]he conclusion of the attorneys for Dr. Rogers that this was in his best interest should not be lightly overridden and subject such attorneys to a malpractice action against them based on no sound allegation of damage. To do so would invite speculative action on the part of any individual who has expressed a desire that his particular action not be disposed of, even though in the best interests of the client.[20]

The *Rogers* attorney malpractice action presents the difficult problem resulting from the conflict of interest inherent in the insurance tripartite relationship. The conflict arose in an unusual context in *Rogers* since most professional liability insurance contracts require the consent of the insured for a settlement.[21] Nevertheless, the *Rogers* decision has possible implications of a broad nature in the insurance industry. For example, settlements in automobile accident cases are commonly handled in a manner similar to that in the *Quilico* medical malpractice action. While

16. In Berlin v. Nathan, No. 75-M2-542 (Ill. Cir. Ct. June 1, 1976), punitive damages were granted on a malicious prosecution suit. This decision, however, was reversed by the Illinois Court of Appeals in Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978).

17. The majority did not review the sufficiency of the damages since it believed that the sufficiency was not specifically contested. The dissent did address the problem of damages. *See* text accompanying note 19 *infra*.

18. 74 Ill. App. 3d at 476, 392 N.E.2d at 1373 (Alloy, J., dissenting).

19. The Illinois Supreme Court specifically refused to address the issue of whether the insurance company could settle the action without Rogers' consent. No. 52548, slip op. at 3.

20. 74 Ill. App. 3d at 479, 392 N.E.2d at 1375 (Alloy, J., dissenting).

21. *See, e.g.*, Transit Cas. Co. v. Spink Corp., 94 Cal. App. 3d 124, 135, 156 Cal. Rptr. 360, 367 (1979).

the possible damages to the insured for wrongful settlement may not be as apparent or as substantial in the automobile accident situation, they definitely are present.[22] A fortiori, a wrongful settlement in this context could precipitate civil liability on the part of the attorney as well as disciplinary penalties.[23]

The *Rogers* attorney malpractice case did not address the problem of disciplinary measures in any detail; the case focused on the issue of attorney malpractice. Because malpractice generally is considered to be a negligence action[24] the decision should be analyzed in that context. To recover the plaintiff must prove: (1) a duty or obligation, recognized by law, requiring the party to adhere to a certain standard of conduct; (2) a failure to conform to that standard; (3) damages; and (4) causation.[25]

Inherent in any attorney-client relationship is the obligation of the attorney to act in his client's best interest.[26] An attorney is bound to conduct himself as a fiduciary; in all relations with his client, he is obligated to exercise the utmost good faith and fidelity.[27] As seen in the *Quilico* medical malpractice action, insurance cases often create the added difficulty of multiple clients in the same litigation. Most insurance contracts expressly empower the insurer to select the attorney of its choice to defend the insured.[28] The attorney is then obligated to represent the interest of both the insured and insurer. When a conflict arises between multiple clients, Disciplinary Rule 5-105 provides that the attorney should either terminate the multiple employment or disclose fully the conflict and obtain approval from each client before continuing representation. The insurance contract does not appear to vary these ethical obligations and duties.[29] The courts consistently have stated that the defense counsel owes the same unqualified loyalty to the insured as if he had been personally retained by the insured. In fact, several courts have maintained that the loyalty to the insured may even be paramount because the defense of the

22. An automobile accident may increase substantially insurance premiums. In addition, the existence of a bad driving record may affect adversely the job possibilities of truck drivers, bus drivers, and traveling salesmen.

23. *See* Calkins, *Dilemmas in Professional Ethics: Counsel for Insurance Company and Insured May Face Conflicts Requiring Full Disclosure to Both Clients,* 36 J. Mo. Bar 57 (1980).

24. *See* W. Prosser, Handbook of the Law of Torts 161 (4th ed. 1971).

25. *Id.* at 143. *See also* Nichols v. Blake, 418 S.W.2d 188, 191 (Mo. 1967); 7A C.J.S. *Attorney & Client* § 255 (1980); Comment, *Attorney Liability for Unintentional Malpractice in Missouri,* 39 Mo. L. Rev. 400, 401 (1974).

26. Mo. Sup. Ct. R. 4, EC 5-1 states: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties."

27. *See In re* Oliver, 365 Mo. 656, 665, 285 S.W.2d 648, 655 (En Banc 1956); Gardine v. Cottey, 360 Mo. 681, 694, 230 S.W.2d 731, 739 (En Banc 1950); Addison v. Cope, 210 Mo. App. 569, 578, 243 S.W. 212, 214 (Spr. 1922). *See generally* 7A C.J.S. *Attorney & Client* § 234 (1980).

28. Mallen, *supra* note 5, at 245.

29. Moritz v. Medical Protection Co., 428 F. Supp. 865, 872 (W.D. Wis. 1977).

insured is the sole basis for the employment.[30] Therefore, Robson had a clear obligation to Dr. Rogers which, at a minimum, required full disclosure. Robson clearly failed to make such a disclosure even though the conflict of interest between the insured and insurer was readily apparent.

In an attorney malpractice action such as *Rogers,* the issue of damages generally is left to the jury and the speculative nature of the damages normally is not a ground for court directed dismissal of the action. Proof of damages in an attorney malpractice case often is difficult, however, because the plaintiff must prove the value of the underlying claim, *i.e.,* the plaintiff must show that he was denied a favorable verdict for a claim he was pursuing because of the attorney's negligence.[31] The underlying claim in *Rogers* was the malicious prosecution action that Dr. Rogers alleged he could have successfully brought against his former patient, Quilico, after a successful defense to the *Quilico* medical malpractice case. The claim was allegedly lost because the settlement in the medical malpractice action by Robson prevented the presentation of a successful defense. It has been noted that damages based on loss of a malicious prosecution action present a novel problem of proof for the plaintiff in the attorney malpractice action.[32] Dr. Rogers not only would have to show that he could have obtained a favorable determination had the *Quilico* medical malpractice action proceeded to verdict, but also would have to show that Quilico brought the medical malpractice action absent probable cause, and that the action was precipitated by malice on the part of Quilico and his attorney. Only by proving that he could have won the medical malpractice action, and subsequently have won a malicious prosecution action against Quilico, could Dr. Rogers show that he was damaged by the wrongful settlement of Robson and thus recover in the attorney malpractice case.

Causation is a determination of whether there is some reasonable connection between the act or omission of the defendant and the damage which the plaintiff suffered. The issue of causation involves two questions: (1) was there causation in fact; and, if so, (2) was there proximate cause?[33] Causation in fact is a question particularly well suited for the jury.[34] Whereas proximate cause is essentially a problem of law; "whether the

30. Parsons v. Continental Nat'l Am. Group, 113 Ariz. 223, 227, 550 P.2d 94, 98 (1976) (quoting with approval Blakslee, *Conflict of Interests: Insurance Cases,* 55 A.B.A.J. 262, 263 (1969) (paramount duty must be to the insured or it would destroy the public's confidence in the legal profession)); American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 590, 113 Cal. Rptr. 561, 570 (1974) (the attorney's primary obligation is to the insured in an action to prevent disclosure of the attorney's working papers).

31. *See generally* Comment, *supra* note 25, at 403-04.

32. *See* Lyddon v. Shaw, 56 Ill. App. 3d 815, 821-22, 372 N.E.2d 685, 690 (1978); Freeman, *Endless Litigation: Justice or Revenge?,* 45 INS. COUNSEL J. 238, 238 (1978).

33. W. PROSSER, *supra* note 24, at 237. *See also* Branstetter v. Kunzler, 364 Mo. 1230, 1237, 274 S.W.2d 240, 245 (1955).

34. W. PROSSER, *supra* note 24, at 237.

defendant should be [held] legally responsible for what he has caused . . . [is] essentially a question of whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred."[35]

The issue of proximate cause in the *Rogers* attorney malpractice action centers on whether Robson should be held liable for settling without disclosure to Dr. Rogers, given the power of the insurer under the insurance policy to settle. The majority found that the failure to disclose foreclosed Dr. Rogers' opportunity to choose to litigate the medical malpractice action to its natural conclusion and bear the risk of an adverse decision along with the possibility of a favorable determination (which the majority believed could lead to a successful malicious prosecution suit against Quilico).[36]

The dissent took another approach, finding lack of proximate cause. Although the dissent phrased its arguments in terms of the speculative nature of the damages, the essence of the argument was that Robson's acts had not caused any actual harm to Dr. Rogers. Causation and proximate cause were lacking as a matter of law because the policy provided that the insurance company could settle without the insured's consent. If the insurer had the power to settle the original action,[37] no harm was caused by Robson effecting the settlement, since Robson was acting in its capacity as attorney for the insurance company when settlement was obtained. The dissent concluded that settlement by Robson following a full disclosure to Dr. Rogers would not have caused any different result. If Robson was found liable but the insurance company was not, the insurer would be encouraged to negotiate a settlement itself instead of hiring an attorney. In other words, if the attorney were restrained but the insurer was not, the insured's interest would still not be protected.

The immediate effect of the *Rogers* attorney malpractice decision on the insurance industry would be fewer settlements. By this result, the decision tends to defeat societal interest in extrajudicial settlements by requiring much more than previously expected before the insurance com-

35. *Id.* at 244.

36. 74 Ill. App. 3d at 475, 392 N.E.2d at 1372.

37. The proposition that insurance companies may settle without the insured's consent, assuming the policy grants such a power, has been widely recognized by the courts. *See* Travelers Ins. Co. v. Hitchner, 61 N.J. Super. 283, 286, 160 A.2d 521, 522 (Law Div. 1960) (insured liable to insurer even though insurer settled against insured's wishes); Wood Truck Leasing, Inc. v. American Auto. Ins. Co., 526 S.W.2d 223, 224 (Tex. Civ. App. 1975) (court upheld insurer's right to settle without consent in the absence of fraud or bad faith, even though it caused the insured to pay higher premiums). *But see* Employers' Surplus Line Ins. Co. v. City of Baton Rouge, 362 So. 2d 561, 564-65 (La. 1978) (majority failed to hold insured liable since the insured failed to consent; dissent pointed out the inconsistency of the majority in giving the insurer the duty to settle and to refuse to settle). The right of the insurer to settle any claim is statutorily recognized in Illinois by ILL. ANN. STAT. ch. 95½, § 7-317(f)(3) (Smith-Hurd 1971).

pany may effect a settlement.[38] In essence, the decision at the least reads more obligations into the insurer settlement clause, and at most reads the clause out of the policy.

In addition to the unwelcome growth of unsettled cases, to effect the result desired by the court—full disclosure to the insured and control by the insured over the settlement process—*Rogers* may be extended to impose new duties on insurance companies.[39] This expansion would create conflicting duties for the insurer. First, the insurer would be required to make a reasonable settlement to protect the insured, a duty resulting from the policy itself. Failure to fulfill the duty could cause the insurer to be liable for any judgment in excess of the policy limit. Second, the obligation to disclose would, in effect, give the insured total control over the decision to settle.[40] Therefore, the ultimate issue not decided in *Rogers* remains: does the insured-client ultimately control the lawsuit?

The greatest risk inherent in the majority opinion is the risk of potential liability of the insured should he elect to litigate the action. The potential liability could be devastating since the insured would be completely liable for the full amount of the judgment. The question arises: is it the court's duty to protect the insured from himself? It appears that an insured should be allowed to waive his coverage as to a particular action; he is the defendant in the case and not the insurance company.

When the case is analyzed as a basis for malpractice against an attorney for wrongful settlement, the equities do not support the finding of proximate cause. Dr. Rogers received what he contracted for, an insurance policy to protect against catastrophic financial loss which allowed settlement without his consent. The courts apparently have made a policy decision that the insurer should control the litigation of a suit as long as it acts in good faith.[41] In *Rogers,* a reasonable insurer probably would have settled the case as Robson did.[42] If the insurer would not be held liable in tort, it seems inconsistent to hold the attorney liable in tort. This is not a proposal that the attorney should not be held to a high standard of conduct; he should. But perhaps a malpractice action is not the proper forum; a disciplinary proceeding may be more appropriate.

---

38. In Transit Cas. Co. v. Spink Corp., 94 Cal. App. 3d 124, 136, 156 Cal. Rptr. 360, 367 (1979), the court stated that "[t]here is . . . a public interest in extrajudicial settlement of lawsuits. The settlement clause tends to defeat that interest and therefore will be narrowly construed . . . ."

39. This is not possible in Illinois. *See* ILL. ANN. STAT. ch. 95½, § 7-317(f)(3) (Smith-Hurd 1971). It might be possible to limit the effect of the Illinois statute through the use of the Code of Professional Responsibility. Although the Code is not enforceable against insurance companies, attorneys must abide by it. This might encourage insurance companies to use nonattorneys to effect a settlement when it could be handled more efficiently by an attorney.

40. *See* Employers' Surplus Line Ins. Co. v. City of Baton Rouge, 362 So. 2d 561, 565 (La. 1978) (Dennis, J., dissenting); authorities cited note 37 *supra.*

41. *See* authorities cited note 37 *supra.*

42. The suit by Quilico was settled for $1,250. 74 Ill. App. 3d at 469, 392 N.E.2d at 1368. Rogers never alleged that the settlement was unreasonable.